

## Permissibility of Recall for witnesses: A Study of some important vital issues



Law

KEYWORDS :

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The recall of a witness for examination in the court on the plea that the defence counsel was not competent and has not effectively cross-examined the witness, more so after the statement of the accused has been recorded under Section 313 of the Criminal Procedure Code; 1974 arises in cases and has become an important issue in as much as the accused might suffer injustice if such a re-call is refused. Such an issue has come up before the Supreme Court in a recent case.<sup>2</sup>

The apex court stated<sup>3</sup> that a reference to Sec 311 of the Criminal Procedure Code as well as to Section 138 of the Indian Evidence Act is necessary for consideration of such a vital issue relating to recall of a witness.

### Sec 311 of the Criminal Procedure Code provides thus:-

"Any court may, at any stage of any inquiry, trial or other proceeding under this code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness or recall or re-examine any person already examined and the court shall summon and examine or recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case".

A clear reading of Sec 311 indicates that the powers of the courts are wide and they have been invested with powers to summon witnesses, or to recall or re-examine any witness already examined.

Section 138 of the Indian Evidence Act dealing with order of examination, states thus:-

"Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witnesses testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination and if new matter is, by the permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Sec 138 spells out clearly that "all that is required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case".<sup>4</sup>

The object of provision for recall, as opined by the Supreme Court<sup>5</sup> "is to reserve the power with the court to prevent any injustice in the conduct of any trial at any stage. The power available with the court to prevent injustice has to be exercised only, if the court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such a power can be exercised. The legislature in its wisdom has left the power undefined." Thus the scope of the power has to be considered from case to case. The "guidance for the purpose is available in several decisions of the Court".<sup>6</sup> The principles laid down for the guidance of the court can be summarised thus:-

- Whether the new evidence is needed and required for the just decision in the case;
- The exercise of the widest discretionary power under Section 311 of the Criminal Procedure Code should ensure that the Judgment should not be rendered inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated;
- If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person;
- The exercise of power under Section 311 of the Criminal Procedure Code should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts, which will lead to a just and correct decision of the case;
- The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice;
- The wide discretionary power should be exercised judiciously and not arbitrarily;
- The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case;
- The object of Sec 311 of the Criminal Procedure Code simultaneously imposes a duty on the court to determine the truth and to render a just decision;
- The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered;
- Exigency of the situation, fair play and good sense should be safeguarded, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified;
- The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the best manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court shall bear in mind that improper or capricious exercise of such a discretionary power may lead to undesirable results.
- The additional evidence must not be received as a disguise or to change the nature of the case against any of the party;
- The power must be exercised keeping in mind that the evidence that is likely to be tendered would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party;
- The power under Sec 311 Criminal Procedure Code must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same

must be exercised with care, caution and circumspection;

- The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and therefore, the grant of fair and proper opportunities to the persons concerned must be ensured being a constitutional goal as well as a human right.

In a leading case, the illness and death of the counsel was held as a valid ground to recall witness by re-opening the case.<sup>7</sup> This cannot be treated as a routinely a rule to be applied. While advancing the cause of justice remains the prime object, it cannot be understood that recall can be allowed for the asking or reasons relating to mere inconvenience.

In the case of reasons attributable to counsel, the court can normally presume that the counsel conducting a case is competent particularly when the counsel is appointed by a choice of a litigant.

If the principle of re-trial on every change of counsel is followed, it can have serious consequences on conduct of trials and the criminal justice system.

Recall of witness can cause undue hardship, if asked to appear repeatedly and the victims also face undue hardship if required to appear for cross examination repeatedly.

The court has observed that “the interest of justice may suffer, if the counsel conducting the trial is physically or mentally unfit on account of any disability.”<sup>8</sup> In the interest of society, a review on this issue is necessary by the Indian Law Commission as well as the Bar Council of India. The judicial scrutiny of the counsel's performance must be careful, differential and circumspect, as the ground of ineffective assistance could be easily be raised after an adverse verdict of the trial.<sup>9</sup> Multiple times recording of evidence of victim and the witnesses ought to be put an end to.<sup>10</sup> The court refused to recall a witness, after the closing of the prosecution case and the accused having been examined and the prosecution not requesting for recall at any stage before the trial judge.<sup>11</sup>

If retrial is ordered or recall of a witness on the ground of competence of the counsel, the trial may continue ‘ad infinitum’ when a serious of counsels engaged by the party are alleged to be incompetent. It would be difficult for the court in a case to ascertain whether the counsel has done a competent job when a witness is cross-examined by the way he has done the job. Further the competence of the counsel was a subjective-matter and plea of incompetent could not be easily accepted. It would be better that in each case, the parties be required to file an affidavit that he fully believes in the competence of the lawyer and the plea of incompetence will not be raised subsequently and this affidavit be filed along with power of Attorney duly signed by the party before the court.

A mere observation that recall was necessary for ‘ensuring fair trial’ is not enough, it should be supported by tangible reasons duly recorded as to how the fair trial has suffered without such recall.

#### **In conclusion, the following suggestions are made:-**

- The courts must invariably keep in mind provisions of Sec 311 of the Criminal Procedure Code and Sec 138 of the Indian Evidence Act and judiciously exercise the power, consistent with interests of justice, before a recall decision is taken;
- The constitutional right of an accused to be defended by a legal practitioner of his choice<sup>12</sup> does not always guarantee that the choice is the best. In view of this in all cases the accused may be asked to file mandatorily an affidavit along

with Vakalatnama (Power of attorney) that he is fully satisfied with the competence of his counsel and will not raise any plea of incompetence subsequently;

- In an extreme case of hardship resulting out of incompetence of the counsel, a rule may govern which may be framed after the Bar Council of India takes a decision on the basis of recommendation made by the Indian Law Commission. This exercise of framing a rule should be done expeditiously to balance the rights of the accused with the interests of justice;
- The guidance provided by the courts in the form of guidelines in series of cases may be used for the exercise of wide discretionary powers vested in the courts in the exercise of power to order recall or retrial of cases;<sup>13</sup>
- Incompetence of the counsel shall not be presumed and if any such plea is raised, it should be decided after giving opportunity to the affected counsel to challenge such plea in the open court;
- The need to give fair opportunity to the accused but also to ensure that the victim of the crime is not unduly harassed.
- Recall power should not result in undue harassment to witness and to the victim;
- Change of counsel cannot be a ground for re-call;
- Recalling of a witness, prejudice will be caused, if not recalled cannot be accepted i.e., in other words, it must shown us to how the prejudice will be caused or miscarriage of justice would take place otherwise.

#### **References**

1. A.G. Vs. Shiv Kumar Yadav AIR 2015 P.3501.
2. In Raja Ram's case AIR 2013 SC P.3081.
3. See Note 1 Para 12
4. -do- Para 11.
5. See for example Rajaram AIR 2013 SCP.3081. See also Mannan SK Vs. State of West Bengal AIR 2014 P.2950; P.Sanjeeva Rao Vs. State of A.P. AIR 2012 SC P.2242; State of Punjab Vs. Gurmit Singh AIR 1996 SC P.1393; State of Karnataka Vs. Shivanna (2014)8 SCC P.916 and others.
6. Hoffman Andreas Case, See Note 1 Para 14 and 15.
7. Note 1 Para 16.
8. Strickland Vs. Washington See Note 1 Para 17.
9. Shivanna (2014)8 SCC P.916. See Para 5 of this Judgment
10. Mir Mohd. Omar Vs. Stte of W.B. AIR 1989 SC P. 1785.
11. See Art 22 of the Constitution of India.
12. See Para 4 of this Study.